Supreme Court, U.S.
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No. 87-1105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGE F. COMBS,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS PRESENTED

1) May a State Court Judge usurp unto himself the province of the Jury, namely the decision and resolution of factual issues on a Rule 56 motion for summary judgment in cases under 45 U.S.C. 51 et seq.?

2) Do the decisions of the Tenth Circuit Court of Appeals in *Atchison T. and S.F. R. Co.* v. *Wottle*, 193 F 2d 628 (1952), conflict with the opinions of Second Circuit Court of Appeals in *Mostyn* v. *Delaware L & W RR Co.*, 160 F 2d 15 (1964), and Third Circuit Court of Appeals in *Carney* v. *Pittsburgh & Lake Erie RR Co.*, 316 F 2d 277 (1963)?

3) Should the Supreme Court exercise its authority to clarify the conflicts between the lower courts by declaring the proper interpretation of the Federal Employers Liability Act in off premises injuries, and particularly the role of the jury in deciding conflicting factual issues thereunder?

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No. _____

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vs.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States

Petitioner, George F. Combs, prays that a Writ of Certiorari issue to review the order and judgment of the Court of Appeals of the Commonwealth of Kentucky, entered in that Court in the above entitled case affirming the Judgment of the Whitley Circuit Court. A Motion for Discretionary Review was refused by the Supreme Court of Kentucky.

OPINIONS BELOW

The opinion of the Court of Appeals, not as yet reported is attached hereto as Appendix A. The opinion of the Whitley Circuit Court is attached hereto as Appendix B. The refusal of the Supreme Court of Kentucky is attached at Appendix C.

JUDGMENT

The judgment of the Court of Appeals of Kentucky sought to be reviewed was refused hearing by the Supreme Court of Kentucky by order dated April 21, 1987.

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U.S. Code, Section 1257 (3).

STATEMENT OF THE CASE

Tersely stated, may a State Court Judge usurp unto himself the province of the jury, namely the decision of factual issues which pertain to an injured railroad employe's claim for damages arising out of his employment under 45 U.S.C. 51 et seq.

The trial court (Kentucky-Whitley County Circuit Court) granted a motion for summary judgment against the Plaintiff employe and in favor of the Defendant Railroad. The ruling of the trial court was sustained upon appeal by the Kentucky Court of Appeals.

The issue upon which the trial court deprived the Plaintiff of his right to a jury trial was a facutal issue namely, the determination of Plaintiff's scope of employment. Scope of employment is generally a factual question for jury decision. In the instant case, the Railroad instructed and sent Plaintiff from his home, Covington, Kentucky, to Corbin, Kentucky, to stay at Corbin Motor Lodge. The Railroad selected and paid for his accommodation and granted meal allowance. Plaintiff checked with the Railroad, as obligated, at 12:15 p.m. and was instructed to take his eight hour rest period. At about 7:00 p.m., he went to a restaurant on the motel premises to eat. The restaurant was very crowded. Plaintiff decided not to wait and when exiting the restaurant, slipped and fell on ice near the doorway and was severely injured.

Modern Railroad practices have employes at temporary locations, living on and off the railroad's premises for the con-

venience of the employer. Numerous cases have held coverage of the Act applies to these off premises and "off duty" employes. A certain number of cases have held coverage of the Act does not extend to these employes under the circumstances presented.

This Court has had little to say concerning off premises, or safe place to work since its pronouncement in *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 2 L. Ed. 1152, which basically provided that the railroad had a nondelegable duty to provide a safe place to work to employees whether on or off the premises, or whether an "independent contractor" was hired to perform railroad duties.

It will be difficult to lay down a precise verbal formula to be applied automatically to determine the distinction between an employee's activities within and those without the coverage of the Act, however, this Court should lay down guidelines for the lower Courts to follow so that the present olio and hodgepodge of lower Court decisions could be avoided. More particularly, the guidelines should iterate the concept of federal paramountcy in these cases under the Act, and stress that when there are factual questions the right to a trial by Jury is a substantive right not to be eroded by niggardly interpretation or a false sense of judicial economy. This Court, has, in the past, repeatedly stated to appellate Courts that the Judges may not interfere with a jury verdict when it appears there is any evidentiary basis,

> "It being immaterial that the Court might draw a contrary inference or feel another conclusion to be more reasonable."

Lavender v. *Kurn*, 327 U.S. 645, 90 L. Ed. 917

The law requires that any material issue, derived from the facts in this or any case, should be submitted to the jury under the Act. This Court should state strongly that Judges in summary judgment proceedings should never substitute judicial feelings for a future jury's finding. Although some

State Courts may find the scope of the Act foreign or even distasteful, under the state law interpretations, this is an issue of federal paramountcy. Under this Act, on a motion for summary judgment, the trial judge must look at the facts through a prism that reflects and divides in the same fashion as an impartial jury's consideration. To achieve some uniformity of decisions in all lower Courts, and maintain federal paramountcy, this issue should be addressed presently.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Circuit Court of Whitley County, Kentucky, and the Court of Appeals of Kentucky, decided that the Plaintiff, from the facts involved, had no cause of action against the Defendant Railroad. In each instance, the Court *weighed* the facts surrounding the incident of injury and concluded that those facts did not constitute a cause of action because the Plaintiff was "off duty" and "outside the scope of his employment."

In the instant case, Plaintiff was assigned to work at Corbin, Kentucky, approximately one hundred and twenty miles from his home and base in Covington, Kentucky. The Defendant transported him and other crew members to accommodations supplied by the Railroad at Corbin Motor Lodge. At 12:15 p.m. on arrival at the Motel, Plaintiff reported to the Railroad and was advised that he should take his eight hour rest period. Plaintiff pursued his own activities, showering, shaving and browsing in a book store. At about 7:00 p.m., he returned to the Motel to eat, and be available for his call to service at 8:15 p.m. The restaurant was very crowded and Plaintiff decided not to wait to eat and when exiting, slipped and fell suffering injury.

The Court of Appeals for Kentucky stated (Opinion Appendix A)

> "We are cited to cases which appear to go in opposite directions in terms of F.E.L.A. coverage for activities undertaken during off duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.,*" 638 F2d 17 (5th Circ. 1981)

The action of the Court of Appeals resulted from the Court, instead of the Jury, *weighing* the evidence and concluding that Plaintiff's return to the Motel to eat was a purely private activity on his behalf, and therefore no reasonable mind could conclude that Plaintiff was within the scope of his

employment. In the *Fowler* case, supra, the facts are totally disparate to the facts in the instant matter and the Kentucky Court of Appeals, in weighing the facts in this case, violated its prerogatives in granting summary judgment.

In *Mostyn* v. *Delaware L & W RR Co.*, 160 F2d 15 (2nd Circ. 1954) at P. 17-18, the Court stated:

> "It seems to us that when a railroad provides shelter or food or both for its employees, they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its employ."

Carney v. *Pittsburgh & Lake Erie RR*, 316 F2d 277 (3 Circ. 1963), held that the Plaintiff's sleeping activity at the "Y.M.C.A." that night was well within the scope of his employment "just as much a part of enterprise as when Carney was stringing cable" (316 F2d at 281).

Kooker v. *Pittsburgh and Lake Erie Railroad Company*, 258 F 876 (6th Circ. 1958) in headnote 3, stated:

> "The obligation of an employer to provide his servants with a safe place to work may extend beyond his premises and to property which third persons have a primary obligation to maintain. See also *Oliver* v. *Chesapeake & Ohio Railway Co.*, 151 N.E. 2d 371.

In accord with these decisions are *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303 (3 Circ. 1955) and *Kimbler* v. *Pittsburgh and Lake Erie RR Co.*, 331 F2d 383 (3rd Circ. 1964).

A conflicting decision appears in *Atchison, T. and S. F. R. Co.* v. *Wottle*, 193 F.2d 628 (10th Circ. 1952) wherein the Court of Appeals decided when decedent (killed in an auto accident far off the railroad premises) set out in his own car to obtain groceries for himself, he was:

> "On missions wholely unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in Commerce within the meaning of the Act." *Id*, 193 F.2d 631.

The great majority of these cases are received by the Courts of Appeal after a trial to a Jury. The *Fowler* case was on summary judgment and on the facts presented for the Rule 56 motion was a correct decision. However, the facts are not a pari with the facts in the instant case. The *Kooker* case was a directed verdict under Rule 50, which in its import is akin to Summary Judgment, but allows all the evidence to be before the Court. The directed verdict was reversed and a new trial ordered.

This Court in *Jack Anderson, et al.* v. *Liberty Lobby, Inc.*, ____ U.S. ____, 91 L. Ed. 2nd 202, laid down guidelines for the application of a motion for summary judgment in a libel case, wherein it was necessary to prove actual malice by clear and convincing evidence. Petitioner believes that guidelines are necessary for lower Courts in Summary Judgments in F.E.L.A. cases.

The issue is federal paramountcy. Since the 1939 amendment to the Act, the intent of Congress was, and still should be, that Jury trial is an integral part of the injured workers' rights. Jury trial is an imperative wherever and whenever there is a facutal issue involved. It has been stated that if reasonable minds could differ as to the import of the evidence, a verdict should not be directed. *Wilkerson* v. *McCarthy*, 338 U.S. 53.

This Court stated in *Meyers* v. *Reading Railroad Co.*, 331 U.S. 477:

> "It is only in the absence of all probative facts which a jury may draw its conclusion that reversible error appears."

Again, in *Jones* v. *East Tennessee*, 128 U.S. 433:

> "So long as the jury system is the law of the land the Jury is made the tribunal."

Under a motion for Summary Judgment, Rule 56, all questions must be resolved against the movant if there is evidence of a factual issue, or facts from which differing reasonable in-

ferences could be drawn. In the instant case, the Petitioner was where he should have been, at the Motel, when he was injured, and eating or preparing to eat is a reasonable part of rest and recuperation. The Court ruling on a Motion for Summary Judgment must look at the law as it applies in cases under the Act, and if there is any question of material fact upon which a reasonable mind could differ then such case is for a Jury decision, and summary judgment should not be granted.

In the instant case, the same motion for Summary Judgment was filed in the District Court for the Eastern District of Kentucky (Bertelsman, Judge). The motion was overruled by Judge Bertelsman. Since that ruling, the judgments in the State Court, absent this Petition, have become final; the ruling of J. Bertelsman, under "full faith and credit clauses" is moot. However, it underscores the evidentiary question that there are facts involved upon which reasonable minds have disagreed.

This Court, by stating guidelines concerning summary judgment in F.E.L.A. cases, would remove the distressing conflicts and uncertainties into which lower Courts have fallen. For that reason, the writ should be granted in the within cause.

CONCLUSION

Petitioner submits that this Court has not since its ruling in *Sinkler* v. *Missouri Pacific Railroad Company*, supra, given any guidance in the area of "off duty, off premises" injuries to railroad workers under the Act. This Court has not issued guidelines to be followed in Summary Judgment proceedings under the Act. Lower Courts have confused factual issues and permissible inferences therefrom, causing recurrent inconsistencies in the rulings of lower courts.

The Court of Appeals for the State of Kentucky erroneously decided that there was no factual issue for jury consideration substituting its decision by weighing of the evidence and depriving Petitioner of his right to a trial by Jury; the Petition for a Writ of Certiorari should be granted, and the Court of Appeals for the state of Kentucky reversed.

Respectfully submitted

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APPENDIX A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 86-CA-741-S

GEORGE F. and REBECCA COMBS
APPELLANTS

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
SEABOARD SYSTEM RAILROAD, INC. and
CORBIN MOTOR LODGE
APPELLEES

Appeal From Whitley Circuit Court
Honorable Emby A. McKeehan, Judge
Action No. 84-CI-535

AFFIRMING IN PART — REVERSING IN PART
(Opinion rendered December 12, 1986, 10:00 a.m.)
NOT TO BE PUBLISHED

* * *

BEFORE: HAYES, Chief Judge, HOWERTON and REYNOLDS, Judges.

HAYES, CHIEF JUDGE: The question presented is whether the trial court erred in summarily disposing of appellants' claims for damages stemming from a fall on ice on the premises of Corbin Motor Lodge. We are convinced that summary judgment is inappropriate insofar as the negligence claim against Corbin Motor Lodge is concerned, but appellants' claim under the Federal Employees Liability Act was properly dismissed.

We agree with appellants' contention that since the advent of comparative negligence in this state, *Hilen* v. *Hayes*, Ky., 673 S.W.2d 713 (1984), proof of some degree of negligence on the plaintiff's part no longer operates to bar his claim. Fault becomes a question of degree and measuring the degree of each parties' fault is the province of the jury. Here, we find a plaintiff who followed other patrons in traversing an icy entrance to a restaurant on the Lodge's premises and a business establishment which has allowed ice to accumulate on its sidewalk. Reasonable minds could differ as to the degree of negligence present in each parties' actions and thus the finder of fact is asked to compare the fault of one to that of the other. We are convinced it was error for the trial judge to usurp this function.

Appellants also asserted a claim against L & N and Seaboard for negligence in failing to provide Mr. Combs a safe workplace. The railroad maintains that the trial judge properly dismissed this claim as appellant was not performing his duties or engaging in activities incident thereto at the time of his injury. We agree.

In his testimony, Mr. Combs admitted he was on his own free time for eight hours. We are mindful of the relationship the railroad maintained with the motel, but we are nevertheless convinced Mr. Combs' activities at the time of the accident were in no way work related. Under appellants' interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling. Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the accident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act.

We are cited to cases which appear to go in opposite directions in terms of FELA coverage for activities undertaken during off-duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.*, 638 F.2d 17 (5th Cir. 1981), which holds that when an employee undertakes a purely private activity,

even upon his employer's premises, he is denied recovery under FELA. In the instant case, Mr. Combs had stopped for a cup of coffee and was on his way to visiting hours at a funeral home when he was injured. We believe this is purely private activity outside the protection of FELA.

The judgment of the Whitley Circuit Court, as to appellees L & N Railroad Company and Seaboard System Railroad, is hereby affirmed. The judgment as to Corbin Motor Lodge is reversed and the case remanded for further proceedings.

Further, pursuant to 2.(a) of the Order designating the Case as a Special Appeal, the application of CR 76.20 and CR 76.32, as well as other appropriate Rules of Civil Procedure pertaining to further appellate steps, are reinstated effective the date of this opinion.

ALL CONCUR.

APPENDIX B

COMMONWEALTH OF KENTUCKY
34th JUDICIAL CIRCUIT
WHITLEY CIRCUIT COURT

CIVIL ACTION NO. 84-CI-535

GEORGE F. COMBS AND REBECCA COMBS,
PLAINTIFFS

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND SEABOARD SYSTEM RAILROAD, INC., AND CORBIN MOTOR LODGE,
DEFENDANTS

FINAL JUDGMENT OVERRULING PLAINTIFFS' MOTION FOR RELIEF MAILED NOVEMBER 26, 1985 AND SUSTAINING MOTION OF DEFENDANTS, L & N RAILROAD COMPANY AND SEABOARD SYSTEM RAILROAD, INC., FOR SUMMARY JUDGMENT

* * * * * * * * *

This matter came before the Court on a series of Motions as follows:

1. On August 8, 1985 the defendant, Corbin Motor Lodge, served Motion for Summary Judgment which Motion was duly briefed by counsel for defendant, Corbin Motor Lodge, and counsel for plaintiffs, George F. and Rebecca Combs. On November 5, 1985 an Order was entered sustaining this Motion.

2. On November 26, 1985 the plaintiff served and mailed for filing a Motion entitled "Plaintiffs Combs' Motion for Relief Pursuant to KRCP 60.02(f); or in the alternative, to make summary judgment final and appealable under KRCP 54.02".

3. On the 27th day of November, 1985 Motion for Summary Judgment was served and filed in behalf of defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc.

4. The Motion of the plaintiffs for relief and the Motion by the defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for summary judgment were briefed by the parties and on Friday, February 21, 1986 these Motions were heard by the Court.

5. The Court having studied the record and carefully evaluated the whole case has concluded that he was correct in his ruling on the Motion for Summary Judgment filed in behalf of the Corbin Motor Lodge and therefore is of the opinion that the Motion of the plaintiff for relief should be overruled; and is of the further opinion that with respect to the Motion of defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for Summary Judgment, that there is no genuine issue of material fact and these defendants are entitled to judgment as a matter of law, and therefore being advised,

IT IS ORDERED that the Motion of the plaintiffs for relief served November 26, 1985 be and it is hereby overruled; and the Motion of the defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for summary judgment is hereby sustained.

This is the final judgment of this Court dismissing all claims of the plaintiffs.

This 25 day of Feb., 1986.

/s/ EMBY A. McKEEHAN
Judge, Whitley Circuit Court

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DRP KM 2-25-86
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d/28

APPENDIX C

SUPREME COURT OF KENTUCKY
86-SC-1088-D
(86-CA-741-D)

WHITLEY CIRCUIT COURT
NO. 84-CI-535

GEORGE F. COMBS and REBECCA COMBS
MOVANTS

V.

LOUISVILLE & NASHVILLE RAILROAD COMPANY/SEABOARD SYSTEMS, INC.
RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is denied.

ENTERED April 21, 1987.

/s/ ROBERT F. STEPHENS
Chief Justice